Supreme Court, U.S.
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No. 95-1262

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

LAURENCE FISHBURNE and THE LOA PRODUCTIONS, INC., a New York corporation,

Petitioners,

v.

CINERGI PRODUCTIONS, INC., a California corporation,
CINERGI PICTURES ENTERTAINMENT INC., a Delaware corporation,
ANDREW G. VAJNA and RANDOLPH M. PAUL,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court of the State of California

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I
INTRODUCTION

Petitioner Laurence Fishburne submits this reply brief in support of his petition for writ of certiorari on the sole issue of purported "mootness" raised by Defendants' opposition brief. As discussed below, and contrary to Defendants' contentions, issues raised by Mr. Fishburne's petition are not moot. Despite Mr. Fishburne's decision to produce the diary for an *in camera* inspection in compliance with the order of the California trial court, Mr. Fishburne's constitutional rights are still subject to attack through discovery orders sought by Defendants -- who have again announced that they are in fact going to seek expansion of the already overbroad trial court order which required Mr. Fishburne to produce his psychotherapist diary for *in camera* inspection. Moreover, the well recognized exception to the mootness doctrine that issues capable of repetition but which evade review are proper subjects for this Court's determination. Mr. Fishburne's right to privacy will continue to be compromised unless the trial court's order in violation of Mr. Fishburne's constitutional rights is voided. Under these independent bases, Mr. Fishburne's constitutional rights must be adjudicated by this Court to provide guidance to lower federal courts and state courts which address these issues during civil discovery.

For these reasons, as well as those stated in Mr. Fishburne's petition, Mr. Fishburne respectfully requests that this Court grant his petition for writ of certiorari.

II
MR. FISHBURNE'S RIGHT TO PRIVACY WITH REGARD TO HIS PSYCHOTHERAPIST DIARY IS NOT RENDERED MOOT BY HIS DECISION TO PRODUCE IT FOR IN CAMERA INSPECTION AS ORDERED BY THE CALIFORNIA TRIAL COURT

"In general a case becomes moot 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S. Ct. 1181 (1982) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396, 100 S. Ct. 1202 (1980)). Thus an issue is *not* moot if it remains "live" and one party (*i.e.* Mr. Fishburne) continues to have a legally cognizable interest in the outcome.

The issues presented by this petition for writ of certiorari -- the constitutionally protected interests Mr. Fishburne maintains in his diary -- remain "live" in two respects despite his decision to produce the psychotherapist diary for *in camera* inspection pursuant to the order of the California trial court.

First, Mr. Fishburne's relationship and ability to communicate with his psychotherapist continues to be affected by the order of the trial court. Mr. Fishburne's reasonable expectation of privacy in his psychotherapist-patient relationship has been invaded by the trial court order to produce his diary for *in camera* inspection. Without a reversal from the Court, the trial court order violating Mr. Fishburne's constitutional rights will continue to be a legal barrier to Mr. Fishburne's assertion of his rights in the future. Moreover, Mr. Fishburne must now live in fear that his written communications, or any other aspect of his relationship with his psychotherapist, will be compromised

during any litigation in which he is involved. Without the relief sought by this petition, Mr. Fishburne's ability to relate his innermost thoughts and confidences to his psychotherapist continues to be compromised.

Moreover, Defendants in this action have already indicated their intent to seek further discovery from Mr. Fishburne's psychotherapist diary. Mr. Fishburne's constitutional rights are still at risk as a result of further discovery of information contained in the diary -- all with a constitutionally void trial court order in place which confirms Mr. Fishburne's vulnerability to such attacks. Thus, Mr. Fishburne's petition before this Court cannot possibly be moot.

III
THE EXCEPTION TO THE MOOTNESS DOCTRINE APPLIES TO MR. FISHBURNE'S RIGHT TO PRIVACY IN HIS DIARY ENTRIES

Even if Mr. Fishburne's petition were technically "moot," this Court has recognized an exception to the mootness doctrine when an issue "is capable of repetition, yet evading review." *Weinstein v. Bradford*, 423 U.S. 147, 148, 96 S. Ct. 347 (1975). This standard applies when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein*, 423 U.S. at 149. All of these elements are present here.

Defendants have already indicated their intent to seek further discovery from Mr. Fishburne's psychotherapist diary. In light of the trial court's order requiring an *in camera* inspection in violation of Mr. Fishburne's substantial

constitutional rights, Mr. Fishburne's constitutional rights remain at risk from such attacks unless this Court declares the civil discovery of such matters to be an unconstitutional infringement upon Mr. Fishburne's rights. Mr. Fishburne did not have the opportunity to await the final adjudication of this petition in the trial court.[1/]

Moreover, Mr. Fishburne's petition presents the issue of whether communications with a psychotherapist by way of a diary of journal is subject to civil discovery. Because of his substantial travel schedule, Mr. Fishburne can only communicate with his psychotherapist by way of his diary. The trial court's order below, requiring the *in camera* production of this diary, invades Mr. Fishburne's constitutional rights of privacy and interferes with his relationship with his psychotherapist. Thus, this Court has the opportunity to review a situation "capable of repetition, yet evading the view" -- whether written communications by way of a diary is protected by constitutional rights of privacy and a federal psychotherapist-patient privilege. There is no question that Mr. Fishburne faces similar further attacks upon his psychotherapist diary in the context of civil litigation. Accordingly, even if Mr. Fishburne's petition is technically "moot," the well-recognized exception to the mootness doctrine applies. This Court must grant Mr. Fishburne's petition so that lower courts will have guidance on these issues.

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1. In fact, Mr. Fishburne complied with the trial court's order to produce the diary for *in camera* inspection solely to preserve the then-scheduled trial date of March 18, 1996. The trial court nevertheless ultimately continued the trial date until September 1996 upon Defendants' motion for a continuance.

IV
CONCLUSION

For the reasons stated in the petition for writ of certiorari and in this reply brief, the Court is respectfully urged to grant the writ of certiorari.

Respectfully submitted,

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